

LEGAL AND JURISPRUDENCE EFFECT OF PEACE INVALIDITY ON RETRIBUTION

EFEITO JURÍDICO E DE JURISPRUDÊNCIA DA INVALIDEZ DA PAZ SOBRE A RETRIBUIÇÃO

Yahya Aryamanesh¹Mohammad Adibimaher²Mohamad Javad Baghizadeh³**Abstract**

One of the important effects of peace on retribution is dropping the death penalty if carried out correctly. Therefore, if the family murder the murderer after peace on retribution, it is considered intentional murdering and its family can retaliate .effect of peace on retribution must be noted. There is a difference in opinion whether peace on retribution can drop the death penalty or not. Some jurists consider the invalidity of peace on retribution as a cause of return on retribution but some other had accepted its effect on the drop of retribution and believe that this assumption of invalid peace, causes doubt that results in dropping the retribution. As an example if the peace is dealt with some taboo issues such as drinking or eating pork, the peace is invalid and lacks legal effects. Some Islamic law experts have accepted the idea of dropping the retribution based on the nature of peace on retribution which is in fact a kind of peace and forgiveness and also according the goodness of peace.

Keywords: Death penalty, Dropping retribution, Islamic Law, Peace on retribution, Peace invalidity.

Resumo

Um dos efeitos importantes da paz na retribuição é a queda da pena de morte, se realizada corretamente. Portanto, se a família assassina o assassino após a paz em retribuição, é considerado assassinato intencional e sua família pode retaliar. O efeito da paz na retribuição deve ser observado. Há uma diferença de opinião sobre se a paz na retribuição pode ou não

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diminuir a pena de morte. Alguns juristas consideram a nulidade da paz na retribuição como uma causa de retorno à retribuição, mas alguns outros aceitaram seu efeito sobre a queda da retribuição e acreditam que essa suposição de paz inválida provoca dúvidas que resultam na queda da retribuição. Como exemplo, se a paz é tratada com algumas questões tabus, como beber ou comer carne de porco, a paz é inválida e não tem efeitos legais. Alguns especialistas em leis islâmicas aceitaram a idéia de abandonar a retribuição baseada na natureza da paz em retribuição, que é de fato uma espécie de paz e perdão e também de acordo com a bondade da paz.

Palavras-chave: Pena de morte, Derrubando a retribuição, Lei islâmica, Paz na retribuição, Invalidez da paz.

INTRODUCTION

Although the main sentence in intentional murdering and amputation is retribution, but the holy law has granted the right of peace and forgiveness by the family of the victim despite determining the sentence of death penalty (IbnIdris, 2006). Therefore as two institutions of peace and forgiveness in retribution have the same laws despite natural differences and if the peace is carried out completely and correctly, the retribution is dropped (Akhondi, 1985). Now the question is that if the peace in retribution is invalid what should be done? What is the law then? Should the retribution be returned? According to studying the opinions of the jurists, if the peace on retribution is illegitimate it causes doubt and retribution are not carried out (Assyrian, 1995).

As it is understood from the opinions of jurists, the rule of Is executed and is a reason for dropping the death penalty sentence and, instead, the atonement is paid.

The nature of retribution

Retribution means punishment, eagle, payback, behaving with the doer the same way, or retaliation in Persian (Qavrdu, 1990; Afrasyabi, 1994).

Retribution in Arabic means following the signs and effects of something (IbnTaymiyyah, 1969; IbnAbedin, 1979).

It has been said in Almanjd dictionary that retribution means the penalty of a sin (6, 8)

Regarding jurisprudence, retribution means tracking and seeking out the effects of crime (11). So that the same act of retaliation is done for his life .In other words, retribution is

doing the same thing that the doer has done before (Imam, 1984). Legislator in Article 61 (Qavrdy, 1990) of the Penal Code defines murder and retribution topic: ((retribution is a conviction that life is convicted to it and should be equal to a criminal.)) (IbnMufleh, 1980; Ibn al-Najim, 1988). (12, 13)

Although the legislators of the year 70 has refused to define retribution in discussing the intentional murder in year 61 against the law, but the general topic as defined in Article 14 of the Penal Code the ordain has accepted it ((retribution is a conviction that a life is convicted of it and should equal his crime)) (Pad, 1972; Langroodi, 1983). The legal definition of retaliation and revocation it can be said that death is the consequence of an offense vindication (IbnManzur, 1988; Langroodi, 2007). In other words, retaliation for killing or injury to the life of crime objection is sustained (IbnHamam, 1980; Jazirei and Ali, 1986).

THE RIGHT OF RETALIATION IN ISLAMIC CRIMINAL LAW

More Shia scholars believe that the death penalty for intentional crimes is set against the physical integrity, there is no counterfeit in there, and it does not affect the Sex Offender and victim. This means that if the perpetrator is male and the female victim and determining the punishment is retribution. Sheykh Mofid has written about this: when a man intentionally kills a woman and the family of the woman decides to receive the atonement, if the murderer accepts it he should pay it (Jurjani, 1988; Langroodi, 1990).

When we say that most jurists believe this is for the reason that this theory has been claimed by them in the principle of punishment for intentional crimes against all physics and it is not just for the criminal being a man and the victim being a woman (Habibzade, 1990; Jaffar, 1994). It should be said that just some of them have clearly said it about when a criminal is a man and the victim is a woman (HojatiKermani, 2016).

About the intentional crimes against physics of human being, most jurists believe that the only punishment is retribution and not the option of atonement although the family of the victim can freely or by receiving atonement forgive the murderer (HurrAmeli, 1987). Alternatively, in some cases because of the lack of possibility of retribution, this sentence is turned to atonement (HosseinRohani, 2011). But this atonement is in return for the retribution and is not considered an Islamic punishment and does not mean selection. The followers of this theory have used the following reasons for proving their theory:

Verses:

Some proofs for this theory are the verses of holy Quran, which proves the option for selecting the right for retribution, and those verses include:

A) And they (the Israelites) in it {the Torah decreed that life for life, an eye for an eye, a nose for a nose, an ear for an ear, and a tooth for a tooth, and wounds retribution}.

B) Of people who have faith; the death sentence, you have been written to: The free for the free, the slave for the slave, and the female for the female, so if one of the brothers, gain something from him (his death sentence, turned out to be blood money) he should follow a good way, and pay blood money in a good way.

And all prohibitions are (subject to) retaliation and exceed anyone you like as he has committed against you as these verses indicate the punishment for intentional crimes against physical body is retribution (Khansari, 1982; Hosseini, 2012). Therefore, claiming another right along with the right of retribution for the family of the victim means ignoring the verses and we cannot ignore the verses without any good reasons (Khomeini, 2015; Khoei, 2017).

It seems that the mentioned verses do not emphasize the theory of determination and they do not oppose the theory of selection (Dehkhoda, 1984). The basis of the verses is that retribution is the punishment for intentional crimes against physical bodies (Ramal, 2009) . However, this punishment of retribution is the only choice for the family of the victim or is there another option to be chosen?

It should be said that the mentioned verses do not say anything about this and it is even possible to say that the verse of 138 of Baqare sura confirms the theory of selection (Riahi, 1984; Alzhyly, 1989; Zera't, 1999; Raghilbsfahani, 2008; Ramal, 2009; Alsrkhsy, 2011) in this holy verse there is another choice and that is forgiveness instead of receiving atonement. And it is ordering the one who forgives to follow the law in this peaceful act and orders the convict to pay the atonement which is in return for retribution .in other words these verses do not agree with forgiveness unless the atonement is paid.

Quotes:

The second category of documentation from the theory of determination of the right of retribution are quotes from Imam including:

A) True quotes of Abd-Allah ibn-Sanan from Imam Sadegh:

If someone kills a believer intentionally he should be sentenced to death penalty unless the family of the victim accepts the atonement. So if they agree with the atonement and the murderer agrees with it the atonement is paid.

B) Quotes from Morsel Jamilibn-Darraaj

Intentional murdering is the murder in which hitting is done intentionally and the punishment is retribution.

Of course, the quote of Jamil is that retribution is the punishment for intentional crime against physical body but it does not show whether retribution is the only choice for the family of the victim or is there another option?

Some jurists have introduced this theory as an accepted theory among jurists and have said that in intentional murdering considering all conditions of retribution atonement is not obligatory if the murderer pays the atonement and the family of the victim is satisfied too.

The atonement is accepted and in this case, the right of retribution is dropped from the family of the victim, as most of the jurist believe.

The mentioned agreement is compromised from two points:

- A) Disagreement of some precedent jurists
- B) Bring documentation in such way that it cannot be cited.

In act 259 of Islamic punishment law approved in 1370 this theory was followed

The theory of selection:

Another theory in this discussion is the theory of selection and moreover to ibn-Joneyd and ibn-Aghil who generally discuss the intentional crime against physical body consider selection other jurists believe that in every case that retribution needs paying atonement the person who possesses the right of retribution has the right to require atonement without the need for life satisfaction.

One of the jurists writes about this:

If a man kills a woman intentionally and the family of the woman wants the murderer to be sentenced to death penalty, they can do it with the condition of paying the difference of atonement for men and women. And if they do not they cannot ask for retribution and if they ask for atonement they can fully receive the atonement for the woman. The documentation for the theory of selection include:

Quotes: Citable quotes are variable in this case and we bring some of them here

A) True quotation of Abd-Allah Ibn-Sanam from Imam Sadegh about a man who intentionally killed a woman. Imam said: If the family of the woman wants to sentence the murderer to death penalty they should pay half of the atonement or if not they can receive half of the atonement

B) True quotation of Abd-Alah ibn-Meskam from Imam Sadegh that said:

If a man murders a woman if the family of the victim wants retribution they should pay half of the atonement and if not they can receive the atonement which is half the price for men.

It has been quoted from Imam Bagher that: They brought a man to the Holy Prophet that hit a pregnant woman on her head and killed her. The holy prophet gave the family of the victim the option to receive 5 thousands Dirham as atonement and the murderer frees a slave for the baby the pregnant woman was carrying (Samii, 1952; Shambayati, 1992; Suyuti, 2006; Snhvry, 2015) or they pay 5 thousand dirhams to the family of the murderer and sentence him to death penalty. According to these quotations, the family of the victim can ask for death penalty if they pay half of the atonement for a man.

Moreover to quotations there is a rule that if the right of choosing atonement is not along with the option of death penalty in some cases the blood of the Muslim has gone to waste for example in cases that the murderer does not have the money

As the legislator has followed this perspective in Act 55 which was proved in 1361 that when a man murders a woman the victim's family can choose between paying of the atonement and ask for death penalty and ask for atonement of the woman. In Act 258 of Islamic punishment law approved in 1990, it is stated that if a man murders a woman the victim's family can ask for death penalty by paying half of the atonement for the man or if the murderer agrees, they can come to an agreement by receiving the atonement (Sanei, 1971; Shahidi, 1988; Odeh, 1971; Sheikh Tusi, 2009; El-Shafei, 2013; Rezaei, 2015). Then again in Act360 approved in 1392 it has been stated that in cases that require paying half of the atonement the family of the victim can choose between retribution or rejecting paying atonement or receiving the atonement. The legislator considers the punishment of intentional murder retribution and a right for the victim's family in which they can ask for death penalty (Ali Abadi, A., 1973).

In act 257 approved in 1370 it is stated that the intentional murder leads to retribution. Therefore the main and primary punishment in intentional crime against physical body is retribution and atonement is a replacement which has conditions and that is the agreement of the family of the victim and if not retribution is determined by them (Miqdad, 1993; Ghazali, 2005; Fakher, 1980).

The legislator of Islamic punishment law has still accepted the punishment of retribution as the only independent right of the family of the victim and otherwise according to other acts of the law, atonement is on the table and receiving atonement in act 359 is if there is an agreement with the convict.

Peace

In terms, peace means compromise and reconciliation and is used as the opposite of fighting. In jurisdictions peace has been used as the following meanings:

- 1) An agreement signed for preventing fighting
- 2) An agreement signed in order to prevent fighting with satisfaction
- 3) Peace is an agreement, which is used for two parties who approve
- 4) Peace is the satisfaction of two parties ad agreement on something including possession or a benefit or dropping a right
- 5) It is an agreement in which two oppose and claim
- 6) In legal terms peace means that an agreement on something whether it is the possession of something or benefit or dropping a right

Peace on retribution

Although the primary and main sentence in intentional murdering is retribution, the holy law has granted the right for forgiveness and peace in spite of determining the punishment of retribution therefore as two institutions of peace and forgiveness have the same rules in spite of different natures, peace on retribution are one of the legal acts that the agreement of two parties is necessary. In other words, satisfaction of two parties is one of the basic conditions for peace. Therefore, peace is effective if both parties agree on it (Fakher, 1980).

Place of peace: Right of retribution is one of the rights that can be agreed upon. Because, firstly, the right of retribution is a human right, secondly, the right of retribution is droppable and transferrable. Therefore, the holder of the right for retribution can change it to atonement (with more or less price)

Conditions for signing peace for both parties

As peace is one of the agreements therefore in contrast to forgiveness not only the person who holds the right to retribution but also the victim should have re required features for signing the peace (Sadeghi, 1971)

In other words in addition to the owner of the right, the convict should be mature, able to make decisions and determine so if one of the parties does not match the required features the peace is not legal. Also, mistakes can invalidate retribution under any circumstances

Return for peace

Atonement can be placed as a return for peace under any circumstances and in an assumption that the return for peace is property it should be worthy and beneficial. There are disagreements for determining the return for peace. Some have considered the clarity of return

for peace obligatory, but if the return for peace does require surrendering its clarity is not an obligatory (Katozian, 1983).

Others consider the clarity of return for peace an obligatory in any circumstances as agreement is the basis for peace and it is not carried out if it is not clarified.

Peace holders

The primary holder of retribution right is the victim. If the victim dies before the convict is sentenced with death penalty or he does not forgive the criminal before death, his family will hold this right. The family of the victim can forgive the convict freely or forgive him by receiving atonement. The legislator has followed the recent theory.

Peace on retribution in prying way

In the claim that peace on retribution is possible from the point of someone not criminal or not, there is a disagreement among scholars as below:

A) Peace on retribution is correct from the point of foreigner even if it is not permitted by the criminal. However, if the peace on retribution is from the point of the person who is not the criminal and is in the name of the criminal in that case the permission of the criminal is obligatory and if not permitted the validity of peace depends on the permission of the criminal. Also, if signing the peace is not done by the foreigner in the name of the criminal, then he does not have the right to return to the criminal to receive the return for peace (Alkasany, 2006).

B) Foreigner peace is not correct whatsoever

Legislator has dropped the right of retribution related to the peace of prying but according to signing the agreement and according to the sayings of God about the goodness of the peace, the peace on retribution is considered as a kind of forgiveness.

Virtues of forgiving retributions:

Two categories of Quran's verses can be mentioned considering the legitimation of forgiving retribution. The first category is the verses that deal with the forgiveness and its priority over vengeance. These verses include:

1- If they forgive, they are closer to piety and godliness

2- And one who forgives has a reward by God

3- Forgive bad people and God loves good people

4- If you punish, punish as you have been requited and be patient and that is better for patient people

And in verses 52,109 and 237 of Bagharah sura and verses 152 and 155 of Al Imran sura God has talked about the levels of the virtues of forgiveness

Second category is the verses that God has motivated the right holders of retribution on forgiveness along with emphasizing the basis of retribution including:

1- You who have believed it is obligatory for you to free. One who have been forgiven should pay the atonement

2- We have written to them that the price of life is life and retribution on hit so when one forgives retribution for atonement that would be instead of his sin

In addition to strong verses, there have been verses by the Imams including:

The Holy Prophet has said; bet behavior of this world and the other world is forgiving someone who has done something to you

2- The Holy Prophet has said: Forgive as forgiveness adds nothing but honor.

3- I have not seen anything from retribution that has been brought by the Holy Prophet and he did not order to forgive

4- When someone forgives the ones who hit them physically God gives them honor and forgives their sins

5- No one forgives other's sins unless God adds his honor because of this forgiveness

GOODNESS OF PEACE

Reasons for legitimacy of peace

1. If two tribes start fighting you, believers bring peace to them

2. Believers are brothers so bring peace among brothers

3. Punishment for bad is bad as God forgives one who forgives

4. Fear God and reconcile

5. Peace is better

6. They sentence him to death penalty unless the family of the victim agrees to receive atonement ...

7. Peace is good among Muslims, unless peace turns something taboo to something legitimate and vice versa

8. If someone murders someone else intentionally the family of the victim should deal with him they can kill if they want to and receive atonement if they want to .Peace is good for them.

As Act 756 of civil law, the personal law is produced from the crime and it is possible that peace is agreed upon it.

Act 257 of Islamic punishment law considers intentional murder as the reason for retribution therefore; it can be turned to atonement if agreed upon

Act 230 of Islamic punishment law states that the case should be clarified and it should be determined whether the killing was intentional or not

Effects of peace on retribution

One of the important effects of peace on retribution is dropping the retribution if carried out correctly.

Therefore, if the family of the victim kills him after the peace on retribution, the killing is considered intentional and the family of the convict can ask for retribution

In addition to the mentioned effect, peace on retribution, like forgiveness, have other effects for the family of the victim, convict and the third person, which are same as the effects of forgiveness (Goldozyan, 1994; Seyyed, 1994).

What is important is about the effects of peace invalidity on retribution .and that peace on retribution can drop the right of retribution.

From view of some jurists, retribution is a human right therefore, if there is a doubt about the retribution it cannot be dependable .Therefore if there is a doubt about it the wise principles should be followed. On the contrary, some have said that retribution is in the field of the God and it is determined by God (Mohammadi, 1997; MoghadasArdebili, 2009; Mughniyeh, 2011).

Retribution is one of the human rights meaning that it is a right that has been implemented for paying the loss but if there is a doubt about it, it should be dropped. As in retribution, there is an issue of life and therefore the judge should pay attention to this right and if there is any doubt, he should prevent it (Najafi, 1985; Noorbaha, 1989).

Dropping death penalty in doubt and the implementation of the precautionary principle
Unity of rule with the principle of caution

Every responsible person should deal with issues with precautions and prevent doubting .But the problem that whether this caution is necessary or not is another discussion.

Here, we discuss the problem of dropping the punishment by the judge .because he has the capability for punishing or its removal which in some cases drops the principle of caution for punishment for the convict.

Now we can state the issue of precaution from the point of the judge in another way. And that is the judge has doubts in physical and spiritual element of the crime that whether the criminal should be convicted or not. For example he hesitates that whether the victim or his family were to agree on peace on retribution and another case could be the invalidity of peace on retribution. On the other hands, implementing the limits of God and not delaying them is necessary. And on the other hands according to the quotations the punishments of God are based on discounts

Therefore, it is necessary to act by caution and not punish the convict or in some cases change the punishment to something easier.

CONCLUSION

In legal books, peace on retribution is introduced as one of the important reasons of dropping the punishment of retribution. And if the agreement is signed correctly by the victim or his family and the convict, the punishment of retribution is dropped.

What is necessary and should be noted about this issue is that whether peace invalidity drops the right of retribution or not. There are differences in opinions of jurists and by studying the opinions of jurisdictions and jurists we came to the conclusion that some Islamic jurisdictions and jurists have accepted the effect of peace on retribution invalidity and believe that in this assumption, invalid peace leads to doubt and the result will be dropping the retribution. For example if the return for peace is some illegitimate case such as drinks then the peace is invalid and should not have legal effects. But, the followers of the theory of dropping the retribution have not accepted this assumption and have accepted the theory of dropping the retribution.

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